Supreme Court, U.S.
FILED

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NUMBER _____ TERM _____

IN THE SUPREME COURT OF
THE UNITED STATES OF AMERICA

CLAUDE C. COUNCIL, JR.,
TRUSTEE FOR JBS CONTRACTING, INC.,
A DEBTOR IN BANKRUPTCY,

Petitioner,

v.

ANJO CONSTRUCTION COMPANY,
A PENNSYLVANIA CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE UNITED STATES OF AMERICA

Counsel of Record for Petitioner:

Fred C. Jug, Jr., Esquire
PA I.D. #58285

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QUESTIONS PRESENTED FOR REVIEW

I. Whether a subcontract with a disadvantaged Business Enterprise in a federally funded highway project could be terminated by the general contractor, without cause, where the contract was subject to, and incorporated by reference, the Disadvantaged Business Enterprise Utilization Affirmative Action Requirements of 49 C.F.R. Part 23?

II. Whether the Pennsylvania Superior Court violated the Supremacy Clause by overturning a jury verdict in favor of a Disadvantaged Business Enterprise by rendering a decision which ignores the Affirmative Action Requirements?

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OPINIONS AND ORDERS
DELIVERED BY COURTS IN THIS CASE

i. Opinion and Order of the Honorable Ralph H. Smith, Jr. of the Court of Common Pleas of Allegheny County Pennsylvania, dated January 4, 1993, denying Respondent's Motion for judgment N.O.V.

ii. Opinion and Order of the Superior Court of Pennsylvania, dated February 2, 1994, vacating the judgment of the trial Court.

iii. Order of Superior Court of Pennsylvania, dated April 11, 1994, denying Application for Reargument of Order of February 2, 1994.

iv. Order, dated November 1, 1994, of the Supreme Court of Pennsylvania, denying Petition for Allowance of Appeal.

v. Order of Supreme Court of Pennsylvania, dated December 15, 1994, denying Petition for Reconsideration.

STATEMENT OF GROUNDS ON WHICH THE JURISDICTION OF THE SUPREME COURT OF UNITED STATES IS INVOKED

i. Petitioner seeks review of the Opinion and Order of the Superior Court of Pennsylvania, dated February 2, 1994. The Superior Court denied Petitioner's Application for Reargument by Order of April 11, 1994. A Petition for Allowance of Appeal to the Supreme Court of Pennsylvania was denied on November 1, 1994. The Supreme Court of Pennsylvania Denied a Petition for Reconsideration by Order of December 15, 1994.

ii. The statutory Provision which confers jurisdiction on the Supreme Court of the United States of America is 28 U.S.C.S. § 1257 (a).

iii. Adjudication of this case requires a review of the Disadvantaged Business Enterprise Utilization Affirmative Action Requirements of 49 C.F.R. Part

23, as amended as these requirements were made a part of the contract but were disregarded by the Appellate Courts of Pennsylvania which violates the Supremacy Clause of the United States Constitution.

iv. The State Court of last resort, the Supreme Court of Pennsylvania, declined to hear an appeal from the Superior Court of Pennsylvania decision which decided a federal question in a way that conflicts with applicable decisions of this Court.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, AND REGULATIONS INVOLVED IN THE CASE

i. Article VI, Clause 2 of the Constitution of the United States of America:

> The Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under

the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

ii. Surface Transportation Assistance Act of 1982, Pub.L. No. 97-424, 96 Stat. 2097, 2100.

iii. The recipient or its contractor agrees to ensure that minority business enterprises as defined in 49 C.F.R. Part 23 have the maximum opportunity to participate in the performance of contracts and subcontracts financed in whole or in part with federal funds provided under this agreement. In this regard, all recipients or contractors shall take all necessary and reasonable steps in accordance with 49 C.F.R. Part 23 to ensure minority business enterprises have the

maximum opportunity to compete for and perform contracts. 49 C.F.R. § 23.43 (a) (2)

iv. The recipient shall advise each subrecipient, contractor or subcontractor that failure to carry out the requirements set forth in § 23.43 (a) shall constitute a breach of contract and after the notification of the Department, may result in termination of the agreement or contract by the recipient or such remedy as the recipient deems appropriate. 49 C.F.R. § 23.43 (c)

v. Recipients shall require their prime contractors to make good faith efforts to replace an MBE that is unable to perform successfully with another MBE. The recipient shall approve all substitutions of subcontractors before bid opening and during contract performance, in order to ensure that

the substitute firms are eligible MBEs. 49 C.F.R. § 23.43 (f) (2)

STATEMENT OF THE CASE

Petitioner, "JBS", qualified as a Disadvantaged Business Enterprise. JBS executed a contract with Respondent, Anjo, to be a subcontractor on a $22 million federally-funded highway project. A jury verdict was returned in favor of JBS and Respondent filed Post-Trial Motions requesting the entry of judgment N.O.V. and/or a new trial. The trial judge denied Respondent's Post-trial Motions, but did reduce the amount of the verdict to $276,723.29 to conform with the evidence of damages presented at trial. Judgment in that amount was then entered in favor of JBS.

The Affirmative Action Requirements for Disadvantaged Business Enterprises were attached to and incorporated into the agreement. The requirements stated that the

minority contractor was to be given maximum opportunity to perform the contract as per 49 C.F.R. Part 23. The recipient (in this case the Commonwealth of Pennsylvania Department of Transportation) was to approve all substitutions of subcontractors. 49 C.F.R. 23 (f) (2).

Two (2) Pennsylvania Department of Transportation officials, who were charged with the enforcement of the Affirmative Action requirements, testified on behalf of JBS. Their testimony was that minority Disadvantaged Business Enterprises could only be terminated for cause and after a complete review by the Bureau of Equal Opportunity.

Respondent terminated JBS for the stated reason that JBS was unable to obtain approval from the Pennsylvania Department of Transportation to do the work contracted for. JBS brought suit in State Court for breach of contract alleging the contract was

terminated without cause as JBS did have approval to perform.

The contract itself was a two page document on a pre-printed form. Various provisions were added by the parties including language that the exhibits attached to the contract, (including the Affirmative Action requirements) were incorporated into the Agreement. Also added by the parties, was language that the minority subcontractor could be terminated if they failed to meet the Contractor's schedule or failed to perform efficiently and expeditiously (sic.). This language is consistent with the Affirmative Action requirements and also with the testimony of the Pennsylvania Department of Transportation officials that certain requirements must be met before a minority subcontractor could be removed.

A meeting was requested by Respondent with the Department of Transportation. The

purpose of the meeting was to request JBS be terminated due to an alleged lack of PennDot prequalification. It was determined at the meeting that JBS was qualified and they were directed to continue working. Respondent forced JBS off the job in spite of the fact that all substitutions of MBEs must be approved by the recipient (Pennsylvania Department of Transportation) 49 C.F.R. § 23.45 (f) (2). Respondent was informed, at the meeting, that their request to terminate JBS was unfounded because JBS had PennDot approval to do the work.

Throughout the remainder of 1985, Respondent submitted forms to the Pennsylvania Department of Transportation that falsely reflected Respondent was satisfying the DBE requirements for minority participation. In reality, no minorities participated in the project and Respondent reaped all of the profits from the $22 million project. JBS, on the other hand,

ended up in bankruptcy.

Respondent appealed to the Superior Court of Pennsylvania following the denial of their post-trial Motions. Four (4) issues were raised with the Superior Court of Pennsylvania of which only one (1) was addressed. That issue was the ability of the respondent to terminate JBS under Article 7 of the contract which stated "the contractor reserves the right to terminate this agreement at any time by written notice to the subcontractor...". Article 7 was in the pre-printed form of the contract and is contrary to the language added by the parties and the Affirmative Action requirements.

The Superior Court of Pennsylvania held that Respondent had a right to terminate JBS under Article 7 and reversed the lower Court judgment on that issue alone. In doing so, the Superior Court ignored the Affirmative Action requirements of 49 C.F.R. Part 23

that were part of the agreement.

CITATIONS TO PORTIONS OF RECORD WHERE FEDERAL QUESTION WAS RAISED

The Affirmative Action requirements were attached as an exhibit to the Contract and Complaint. (Appendix Pp. 25-27). The issue was raised at trial when the Department of Transportation officials testified about the requirements for terminating minority sub-contractors. (Appendix Pp. 27-34). The trial judge charged the jury that they may consider the language added by the parties to supersede the language of Article 7. (Appendix Pp. 34-36). The trial judge also referenced the Affirmative Action requirements in his jury charge. (Appendix Pg. 35).

JBS submitted a proposed jury charge to the trial judge which contained the affirmative action language that the contract required ANJO (Respondent) to take all necessary and reasonable steps to ensure JBS had the maximum opportunity to perform

the contract (Appendix Pg. 36). Respondent argued in their post-trial motions, at the trial court level, that Article 7 provided them with the opportunity to terminate the contract without cause. The trial judge denied Respondent's post-trial motions. JBS preserved the federal question, in their Brief in Opposition to Respondents' Post-Trial Motions by raising the Affirmative Action Requirements as a defense to Article 7. (Appendix Pp. 36-38).

The Affirmative Action issue was also raised by JBS at the Superior Court level where it was alleged that Article 7 was illegal and unenforceable. (Appendix Pp. 38-40). The Supreme Court of Pennsylvania did not grant Petitioner's Request for Allowance of Appeal even though the federal question issue was again raised. (Appendix Pp. 40-43). The only Opinions provided in this case were by the trial Court and Superior Court. The Superior Court Opinion

completely ignores the Affirmative Action Requirements.

ARGUMENT

On January 6, 1983, President Ronald Reagan signed into law the Surface Transportation Assistance Act of 1982. Pub.L No 97-424, 96 Stat. 2097, 2100. This Act greatly increased the amount of funds to be expended with respect to Disadvantaged Business Enterprises. On July 18, 1983, the United States Department of Transportation issued a final regulation to implement the Act (49 C.F.R. Part 23). Under these regulations, each recipient of federal funds was required to establish an overall goal for participation by Disadvantaged Business Enterprises in federal-aid contracts. The purpose of the regulations was to increase minority participation in areas of highway construction which traditionally had only slight minority participation.

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Register, published on March 31, 1980, at page 21174 discussed the goals of the program. Emphasized was the fact that while minority groups represented approximately 15.7 percent of the United States population according to the 1970 census, they owned only three percent of the businesses in the United States. In fiscal year 1979, the Department of Transportation awarded grants of 13.3 billion dollars. Of this amount $360,456,000.00 went to minority contractors. Minority participation as of March 31, 1980 was only between one and two percent of all Department of Transportation financial assistance programs.

The University of Pittsburgh recently issued a report that confirmed minorities in the Western Pennsylvania Region have not been given the opportunity to share in the economic resurrection of the area. Published last October, the study, "Economic Benchmarks:Economic Indices for the City of

Pittsburgh and Allegheny County," was commissioned by the County and the Urban Redevelopment Authority of Pittsburgh. The study is a comprehensive review of historic trends and the current status of the region's economy.

Although the overall economic picture for Western Pennsylvania is encouraging, the study notes that for African-Americans the outlook is bleak. Census figures for 1990 show that, when ranked with the country's fifty largest metropolitan areas, the region's minorities are plagued with the fourth highest poverty rate, the fifth highest unemployment rate and the fourth largest gap between minority and white poverty rates.

49 C.F.R. § 23.43 (a) (2) required that JBS be given the maximum opportunity to participate in the performance of this contract. 49 C.F.R. § 23.45 (f) (2) required the recipient (Pennsylvania

Department of Transportation) to approve all substitutions of minority subcontractors. Respondent asked the Department of Transportation officials for permission to dismiss JBS. This request was denied and Respondent was directed that JBS be permitted to continue to perform. In spite of this mandate, Respondent forced JBS from the job. The Appellate Courts of Pennsylvania ignored the Affirmative Action requirements and did not even mention them in deciding the contract could be terminated without cause.

The decision of the Pennsylvania Appellate Courts is in conflict with the federal laws and applicable decisions of the Supreme Court. This case is also a matter of public importance since it involves an issue that pertains to Disadvantaged Business Enterprises across the United States and is relevant to the most basic course of dealings at the local level.

Unless the decision of the Pennsylvania Appellate Courts is reversed, a holding will stand that is contrary to the very spirit of the Affirmative Action requirements.

It is respectfully submitted that the Affirmative Action Requirements would be completely worthless if minority contractors were denied redress in the state courts. Boilerplate contract provisions which provide for cancellation of the contract without cause, are frequently found in subcontracts for highway construction. The delay and backlog associated with state and federal administrative remedies does not afford minority subcontractors any practical redress. Therefore, it is incumbent upon this court to instruct the state court systems as to the applicability of federal regulations which, in turn, would open the state courts to enforcement of these Affirmative Action Requirements.

The Constitution of the United States

of America, at Article VI, Clause 2, provides the laws of the United States shall be the supreme law of the land and the judges in every state shall be bound thereby. The Superior Court of Pennsylvania's decision in this case violates the Supremacy Clause. The Petitioner, JBS, prays the Supreme Court of the United States of America will grant this petition for Writ of Certiorari so that this federal issue may be decided.

Respectfully submitted,
BRANDT, MILNES, REA & WISE

Fred C. Jug, Jr., Esquire
Gary Milnes, Esquire
Counsel for Petitioner
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PA I.D. #32417

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PA. Firm No. 032

CERTIFICATE OF SERVICE

I hereby certify that an original and forty (40) copies of this Petition for Writ of Certiorari were served by U.S. Mail, Overnight delivery on the Clerk of the United States Supreme Court at the following address:

One 1st Street N.E.
Washington, D.C. 20543

Three (3) copies were also served on counsel for Respondent this 15th day of March 1995, by 1st Class U.S. Mail, postage pre-paid at the following address:

Robert A. King, Esq.
Babst Calland, Clements & Zomnir
Two Gateway Center
8th Floor
Pittsburgh, PA 15222
(412) 394-5400

Date: March 15, 1995

Fred C. Jug, Jr., Esq.
Counsel for Petitioner

IN THE COURT OF COMMON PLEAS

OF ALLEGHENY COUNTY

PENNSYLVANIA

CLAUDE C. COUNCIL,	:	CIVIL DIVISION
JR., Trustee For JBS	:	
CONTRACTING, INC.,	:	GD 86-3005
Plaintiff	:	
versus	:	OPINION IN
ANJO CONSTRUCTION	:	SUPPORT OF ORDER
COMPANY, A	:	OF JANUARY 4,
Pennsylvania	:	1993
Corporation,	:	RALPH H. SMITH,
Defendant	:	JR., J.

O P I N I O N

Following a verdict in favor of the plaintiff, defendant filed its motion for post trial relief requesting either judgment n.o.v or a new trial. After consideration of defendant's motion and oral and written arguments of counsel, the court entered an order on January 4, 1993 (Appendix I) denying the defendant's motion on the question of liability and granting it on the issue of damages unless the plaintiff filed a remittitur. The plaintiff entered its remittitur in the amount ordered by the court and subsequently judgment was entered on the verdict as reduced.

Defendant noticed the court of its appeal to the Superior Court, hence this opinion.

The instant case is a civil action for damages arising out of a breach of a contract between the plaintiff and the defendant. The parties hereto entered into a written contract which was revised as well

as several oral agreements for work not contemplated by the written agreement. The original written contract and the revised written contract were, as defendant points out in its brief, basically the same.

Therefore, we will refer to these contracts as the contract unless the contrary is stated. The issues raised by the pleadings were submitted to the jury under what we find to be proper instructions and the jury produced a verdict (with the exception of the amount of damages) which is supported by the record.

Although the defendant's motion fails to set forth the place in the record where it preserved its objections to the errors complained of and although some of them are "boilerplate" in nature, we will review them seriatim.

"A" TERMINATION OF THE CONTRACT

It was defendant's contention that it had the right under the terms of the written

contract to terminate it upon giving the plaintiff notice (Clause 7). This clause was in a preprinted part of the agreement prepared by the defendant. However, there was a type written clause on the reverse side of the contract that dealt with termination and was different from clause 7. In its charge the court instructed the jury that where there is an ambiguity in the contract the jury could interpret it against the person preparing it, in this case the defendant. Also the court instructed the jury that where there is a conflict between two provisions in a contract that the typewritten should take preference over the printed. This portion of the charge the defendant cited as a basis for granting its motion. We found that this instruction was a proper expression of the law and one that was applicable to the facts.

"B" DAMAGES

In its motion defendant contended that it did not owe any damages to the plaintiff since it had the right to terminate the contract, that the elements of the damages were improper and that the damages were excessive. With this contention we agreed in part. According to the damages pled by the plaintiff in its complaint and the evidence proffered at trial, the amount of damages was in excess of that Plaintiff proved at trial. For this reason we granted a new trial unless the plaintiff entered a remittitur. The plaintiff filed a remittitur in accordance with the court's order.

We have examined defendant's contentions with regard to the damages other than the one set forth above and found them to be without merit.

"C. THE VERDICT IS CONTRARY TO THE EVIDENCE"

In this boilerplate objection to the jury's verdict the defendant contends that the record does not support the verdict. With regard to the amount of the verdict we agreed with the defendant and granted a new trial as to damages unless a remittitur was entered.

With regard to the liability aspect of the verdict we disagreed. Here, there is no disagreement that the plaintiff and the defendant entered into a contract and that the contract was "terminated" by the defendant. Whether this "termination" was a valid exercise of its rights under the contract by the defendant or an actionable breach of the contract was the main liability issue which was submitted to the jury under what we have found to be proper instructions. The jury's verdict on the issue of liability was justified by the record and, for this reason, should not be disturbed by the court.

"E. STANDING"

When the case was first assigned for trial the court, sua sponte, raised the question of whether the plaintiff was the proper party to maintain the instant law suit since it was in bankruptcy. JBS Contracting, Inc. contended that it was while the defendant contended that it was not.

As a result of the initial conference with counsel, another conference was held at which the trustee in bankruptcy attended. The trustee informed the court that he was fully aware of the nature and extent of the litigation and that he approved and agreed to the named plaintiff proceeding with the trial.

Subsequent to the entry of the verdict, the named plaintiff and the trustee petitioned the court for leave to amend the pleadings to show that the trustee of the bankrupt estate was the plaintiff. Over the

defendant's objections the court allowed this amendment.

Trial courts have been admonished to liberally allow amendments in order that justice be accomplished and where to do so would not work a prejudice to the other party. When we consider that the defendant had knowledge of the bankruptcy prior to trial, that the trustee appeared before the court and stated that he authorized the proceeding and that the name of the trustee and the bankrupt estate had no bearing on the trial of the case or its outcome, we are unable to see where the continuation of the trial and the subsequent amendment were prejudicial to the defendant.

F. EVIDENTIAL AND INSTRUCTIONAL ERRORS

Defendant contends that the court erred in the admission of evidence as well as in its charge to the jury. Although the defendant's motion fails to cite where in the record it objected to these alleged

errors or, in the case of some, that it protected its right to post trial review thereof, our opinion is that the matters raised are either not reviewable or, if they are, that they are not meritorious.

"D. VERDICT IS AGAINST THE WEIGHT OF THE EVIDENCE"

This "boilerplate" basis for the granting of the defendant's motion has been discussed supra and, with the exception of the amount of the verdict, has been found lacking.

CONCLUSION

For the reasons set forth herein we entered our order of January 4, 1993.

O R D E R OF C O U R T

AND NOW, to-wit, this 4th day of January, 1993, upon consideration of the defendant's Motion for Post-Trial Relief, it is hereby ORDERED, ADJUDGED and DECREED as follows:

1. That the motion regarding the relief on the issue of liability is denied; and

2. It appearing to the court that the amount of the jury's verdict is not founded in or justified by the record in the instant case, the defendant's motion for a new trial, limited to the issue of damages, is hereby granted unless within ten days the plaintiffs file a remittitur in the amount of $140,000.

ENDORSEMENT

In accordance with the Judicial Code [42 Pa. C.S.A. §8142 (c)], the undersigned hereby certifies that the above judgment or order was executed on the date indicated at 3:41 a.m., (local prevailing time).

/s/ Ralph Smith, Judge

SUPERIOR COURT OF PENNSYLVANIA

PITTSBURGH DISTRICT

CLAUDE C. COUNCIL,	:	N o . 2 1 1
JR., Trustee For JBS	:	PITTSBURGH, 1993
CONTRACTING, INC., A	:	
D e b t o r i n	:	
Bankruptcy,	:	
v.	:	
ANJO CONSTRUCTION	:	
COMPANY, A PA	:	
Corporation,	:	
Appellant	:	

J U D G M E N T

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of ALLEGHENY County be, and the same is hereby VACATED AND CASE REMANDED JURISDICTION RELINQUISHED.

BY THE COURT:

February 2, 1994

/s/Eleanor R. Valecho

DEPUTY PROTHONOTARY

J. A 46045/93

CLAUDE C. COUNCIL,	:	IN THE SUPERIOR
JR., Trustee For JBS	:	C O U R T O F
CONTRACTING, INC., A	:	PENNSYLVANIA
D e b t o r i n	:	
Bankruptcy,	:	N o . 2 1 1
v.	:	PITTSBURGH, 1993
ANJO CONSTRUCTION	:	
C O M P A N Y , A	:	
P e n n s y l v a n i a	:	
Corporation,	:	
Appellant	:	

Appeal from the Judgment Entered

January 8, 1993

In the Court of Common Pleas

of Allegheny County

Civil Division No. GD 86-3005

Before: CIRILLO, FORD ELLIOTT and CERCONE, JJ.

MEMORANDUM: FILED: FEB. 2, 1994

This is an appeal from the civil judgment entered by the Court of Common Pleas of

Allegheny County. For the reasons set forth below, we vacate the judgment of the trial court and remand for entry of judgment notwithstanding the verdict in favor of appellant.

Appellant Anjo Construction Company, (contractor) was a prime contractor under a contract with the Pennsylvania Department of Transportation (PennDOT) to build an expressway. Contractor entered into two contracts with JBS Contracting, Inc. (Subcontractor) to complete a portion of the construction project. The parties entered into the initial contract on October 17, 1984, and revised the agreement by contract dated April 3, 1985. The parties agree that with the exception of certain changes as to the work to be performed, there are no significant differences between the two contracts.

On April 17, 1985, contractor canceled its contracts with subcontractor. Thereafter,

subcontractor filed a complaint alleging breach of contract by contractor, and seeking damages for the breach. A jury trial on the matter resulted in a verdict in favor of subcontractor. Contractor filed post-trial motions which requested either judgment n.o.v. or a new trial. The trial court denied contractor's motion on the question of liability, but granted it on the issue of damages unless subcontractor filed a remittitur. Subcontractor entered its remittitur in the amount ordered by the court. The trial court entered judgment on the verdict and this timely appeal followed.

Appellant contractor raises the following issues for our review:

I. Whether judgment n.o.v. should be granted in an action for breach of contract when the contract gives the defending party the absolute right to terminate the contract?

II. Whether judgment n.o.v should be granted when a duplicative excessive and speculative verdict is awarded despite clear and unambiguous provisions in a contract which define and limit a contracting party's compensation thereunder?

III. Whether a new trial should be granted when a trial court refuses to instruct a jury on legal principles which form a significant defense in a breach of contract claim.?

IV. Whether a new trial should be granted when a trial court admits highly prejudicial evidence which has no bearing on whether a contract was breached.

We will address these issues in order.

Contractor first argues that the trial court improperly refused to grant judgment n.o.v. where the contract specifically permits it to terminate the contract for any

reason. Our standard of review in considering the denial of a motion or judgment notwithstanding the verdict is quite narrow:

> Judgment n.o.v. is proper only in a clear case; in reviewing its denial, we examine the evidence in a light most favorable to the verdict-winner, including all reasonable inferences arising from the evidence, and we resolve any conflicts in the evidence in favor of the verdict winner. A verdict for the plaintiff, which survived a motion for judgment n.o.v., must stand if there is evidence upon which the jury could find that the defendant was liable.

Lokay v. Lehigh Valley Co-op. Farmers, Inc., 342 Pa. Super. 89, 94, 492 A.2d 405, 407 (1985) (citations omitted).

Contractor contends that under Article 7 it is entitled to terminate its agreement

with subcontractor at any time and for any reason. Article 7 provides:

> The Contractor reserves the right to terminate this Agreement at any time by written notice to the Subcontractor. In the event of termination under this section, the Subcontractor shall be paid for all materials furnished and work performed at the date of termination on a pro-rata basis. No profits shall be allowed on the uncompleted portion of the Contract.

Revised Contract dated April 4, 1985, Article 7. Subcontractor asserts that a typewritten section included in the agreement allows termination only for cause. The typewritten section provides:

> Should the Subcontractor fail to meet the Contractor's schedule, or fail to perform efficiently and expediously [sic], and as directed by the Contractor, the Contractor reserves the

right to terminate this Agreement, hire other Subcontractor, or complete the work using his own forces and backcharge the Subcontractor accordingly, including but not limited to legal fees and management costs at the rate of 100% of the legal fees incurred.

Revised Contract date April 3, 1985.

When the Superior Court, as a reviewing court, is asked to interpret or review the meaning of a contract, the intent of the parties is paramount, and our objective is "to ascertain the parties' intent as it is manifestly expressed in the agreement itself. Warren v. Greenfield, 407 Pa. Super. 600, 607, 595 A.2d 1308, 1311 (1991). The intent of the parties to a written contract is regarded as embodied in the writing itself. Id. (citing Marcinak v. Southeastern Greene School District, 375 Pa. Super. 486, 544 A.2d 1025 (1988); and Giant Markets v. Sigma Marketing Systems, 313 Pa.

Super. 115, 459 A.2d 765 (1983)). In the absence of technical terminology, we give the words used in the agreement their plain and ordinary meaning. Warren v. Greenfield, 407 A.2d at 607, 595 A.2d at 1311-12. When the words of a contract are unequivocal, they speak for themselves, and a meaning other than that expressed cannot, and will not be given to them. Id. at 607, 595 A.2d at 1312.

A contract is ambiguous if it is reasonably susceptible of different constructions and capable of being understood in more than one way. Metzger v. Clifford Realty Corp., 327 Pa. Super. 377, 386, 476 A.2d 1, 5 (1984). The court, as a matter of law, determines the existence of an ambiguity, whereas the resolution of conflicting parol evidence, admitted to clarify the ambiguity, rests with the trier of fact. Hutchison vs. Sunbeam Coal Corp., 513 Pa. 192, 200, 519 A.2d 385, 390 (1986).

Additionally, we note that where a written clause is repugnant to a printed clause in the same contract, the printed clause yields to the written clause, as the written clause presumably evinces deliberate expression of the parties' true intent. Goldstein v. Blumenfeld, 393 Pa. Super 263, 265, 574 A.2d 109, 110 (1990).

Here, subcontractor contends, and the trial court agreed that the typewritten clause restricts contractor from terminating the contract for any reason. Under subcontractor's interpretation, the typewritten clause permits termination only for cause. However, upon review of the plain language of both provisions, we conclude, as a matter of law, that the provisions are not in any way ambiguous or repugnant.

Article 7 clearly permits termination of the contract for any reason. The typewritten provision does not limit this

right, but merely provides a separate remedy for contractor "[s]hould the Subcontractor fail to meet the Contractor's schedule . . . ." The typewritten provision uses no language which could be construed as limiting contractor's termination rights. Because the contract clearly allows the contractor to terminate rights for any reason, and because subcontractor's complaint for breach of contract is premised upon contractor's alleged breach for termination without cause, we find that the trial court erred in not granting judgment notwithstanding the verdict.

We need not address contractor's remaining allegations of error in view of our resolution of its first issue.

The judgment of the trial court is vacated. The case is remanded for entry of judgment notwithstanding the verdict in favor of appellant/contractor. Jurisdiction is relinquished.

THE SUPERIOR COURT OF PENNSYLVANIA

OFFICE OF THE PROTHONOTARY

April 11, 1994

IN RE: CLAUDE C COUNCIL ET AL VS ANJO CONSTRUCTION COMPANY NO. 211 PITTSBURGH 1993

Dear Mr. Jug:

The court has entered the following order on your Application for Reagrument filed in the above captioned matter.

"ORDER OF COURT

The court hereby denies the application filed February 15, 1994 requesting reargument or reconsideration of the decision dated February 2, 1994.

Very truly yours,

/s/Eleanor R. Valecho

DEPUTY PROTHONOTARY

IN THE SUPREME COURT OF PENNSYLVANIA

WESTERN DISTRICT

CLAUDE C. COUNCIL,	:	NO. 243 Western
JR., TRUSTEE FOR	:	District
JBS CONTRACTING,	:	Allocatur Docket
INC., A DEBTOR IN	:	1994
BANKRUPTCY,	:	
Petioner	:	
v.	:	Petition for
ANJO CONSTRUCTION	:	Reconsideration
COMPANY, A	:	
PENNSYLVANIA	:	
CORPORATION,	:	
Respondent	:	

ORDER

PER CURIAM:

AND NOW, this 15th day of December 1994, the Petition for Reconsideration is hereby denied.

Mr. Justice Montemuro is sitting by designation.

IN THE SUPREME COURT OF PENNSYLVANIA

WESTERN DISTRICT

CLAUDE C. COUNCIL,	:	NO. 243 Western
JR., TRUSTEE FOR JBS	:	District
CONTRACTING, INC., A	:	Allocatur Docket
DEBTOR IN	:	1994
BANKRUPTCY,	:	
Petioner	:	
v.	:	Petition for
ANJO CONSTRUCTION	:	Allowance of
COMPANY, A	:	Appeal from
PENNSYLVANIA	:	Superior Court
CORPORATION,	:	
Respondent	:	

ORDER

PER CURIAM:

AND NOW, this 1st day of November, 1994, the Petition for Allowance of Appeal is hereby denied.

Mr. Justice Frank J. Montemuro is sitting by designation.

Contract Language Incorporating Affirmative Action Requirements into the Agreement

Exhibits A, B, C, D, E and F attached, as required by the contractor specifications, are incorporated into this agreement. (R. 1299).

Disadvantaged Business Enterprise Utilization Affirmative Action Requirements

A. DBE & WBE GOALS - The Pennsylvania Department of Transportation has established in connection with this contract, the goal of fifteen percent of the contract price for the utilization of firms earned and controlled by disadvantaged and the goal of two percent of the contract price for the utilization of firms owned and controlled by women. (R. 1311).

B. POLICY - It is the policy of the U.S. Department of Transportation and the Pennsylvania Department of Transportation that Disadvantaged Business Enterprises (DBE), as defined in 49 CFR Part 23, as

amended, and this provision, shall have the maximum opportunity to participate in the performance of contracts financed in whole or in part with Federal funds under this contract. Consequently, the DBE requirements of 49 CFR Part 23, as amended, apply to this contract. The term DBE as used throughout shall also apply to women's business enterprise (WBE) goals and all requirements herein are applicable. (R. 1311).

C. DBE OBLIGATION - Take all necessary and reasonable steps in accordance with 49 CFR Part 23, as amended, to ensure that DBEs have the maximum opportunity to compete for and perform contracts. Do not discriminate on the basis of race, color, national origin, or sex in the award and performance of Pennsylvania Department of Transportation and U.S. Department of Transportation assisted contracts. (R. 1311).

D. FAILURE TO COMPLY WITH DBE REQUIREMENTS

All contractors and subcontractors are hereby advised that failure to carry out the requirements hereinabove constitutes a breach of contract and, after notification to the U.S. Department of Transportation, may result in termination of the contract, being barred from bidding on Department contracts for up to three (3) years or any other remedy as the Pennsylvania Department of Transportation deems appropriate. Intentional failure to comply with DBE requirements may result in forfeiture of bid guarantee. (R. 1311).

TESTIMONY OF WILLIAM ARNOLD,
PENNSYLVANIA DEPARTMENT OF TRANSPORTATION

Q. Does PennDot have a standard procedure for the termination of a minority, and does PennDot have standard rules and regulations regarding some protection for the minorities?

A. In order for a prime contractor to dismiss a sub, it would have to be reviewed by the Bureau of Equal Opportunity. (R. 669).

Q: Are there some things that have to be done or shown? Tell the jury what those might be.

A: It has to be shown that the subcontractor cannot perform the work either because he has gone bankrupt or he doesn't have adequate supervision or his work force isn't capable of doing the work. (R. 669-670).

Q: As a bottom line, you look at if the job can be done, and if the job can get done at the contract price; is that a fair statement?

A: Yes. (R. 670).

Q: Would the ultimate determination about whether a minority be given a chance to do the work, to do any specific task, would that bottom line be they have to

get one of these approvals on one of the 4339's (approval forms)?

A: They have to have that approval. (R. 670).

TESTIMONY OF DUDLEY P. LIGHTY

Q: And from where are you retired?

A: The Pennsylvania Department of Transportation. (R. 886).

Q: And what was your position at the time of your retirement, sir?

A: I was Chief of the Contract Management Division, Bureau of Construction. (R. 886).

Q: Who was the man at Penndot who was ultimately responsible for the administration of subcontractor approval, would you say that is you?

A: I was, yes. (R. 887).

Q: Do you recall Mr. Lighty, at the meeting of May 17, 1985, whether the meeting ended in such a way that, one, the parties were going to try to work

something out; or two, JBS wasn't going to work under the contract; do you recall that?

A: My recollection is that they were going to try to work things out. (R. 903).

Q: Are there regulations regarding protection that is afforded minority subcontractors?

A: The DBE special provisions is made part of those contracts now. You have to keep in mind there are various versions of that special provision that developed over a ten year period. I know that in the later stages there were... (R. 919).

Q: Have there been rules regarding termination that's been consistent over the last ten years so there is no issue as to what was in effect in '84?

A: I would say that the Department would be concerned that if there is a termination of a DBE contract, they would probably

want to know why and what the circumstances are. (R. 921).

Q: Whether there were recognized good faith efforts that must be applied to these DBEs...?

A: There were procedures to measure good faith efforts. (R. 946).

Q: And what were those procedures?

A: Now, you have to go back, well, months through the process. The apparent low bidder had to submit the Attachment A, and on that list, he would list his DBE's and the work each of those DBE's was proposed. That was reviewed by the Department of Equal Opportunity to see if it met the contract requirements. If it was approved, if the goal was met, it was approved. If the goal wasn't met, the contractor would have to show a good faith effort if he could not meet the goal. After that was done, the contract would be awarded to the apparent low

bidder. If any changes were made to the original Attachment, a revised Attachment would have to be processed. If any of the DBE's originally named were replaced, or some of the work was deleted, a revised Attachment A would have to be submitted to the Department, and again that Attachment A would have to be revised and approved. If it was approved, then the Department was satisfied that the change was in order. (R. 946-947).

Q: Okay.

A: And the good faith effort was really handled by the Equal Opportunity Office and Good Faith Effort Committee of the Department and was shared by the Deputy's secretary.

So really all revised Attachment A's, in effect, went to a committee to determine if a good faith effort was made by the prime contractor. (R. 947).

Q: Would it be fair to summarize that these would be submitted to reflect substitution of work, is that right?

A: Substitution of work within a sub or total substitutions of the entire subcontractor's. (R. 947).

Q: ...Based upon the fact that all these forms...were submitted and approved, could JBS, and would PennDot allow JBS to work and perform these items...?

A: Sure. (R. 967).

Offered as Plaintiff's Exhibit 39 was a letter from respondent which read in relevant part:

"We request a meeting of all concerned be scheduled to review the program and determine the suitability of our DBE subcontractor, JBS Contracting, Inc. (R. 888-889).

Q: Did you ever say at that meeting JBS could not perform?

A: Could not perform? I wouldn't make a statement like that. (R. 901).

Q: In fact, all these things I just showed you previous to this are evidence they had attained approval to perform prior to this...?

A: On certain work classifications, yes. (R. 901).

JURY CHARGE BY TRIAL JUDGE

Let me explain to you when you construe or interpret a contract, you can interpret it against the party who prepared it if there are ambiguities in the contract which cannot be and have not been explained away.

And then you have printing. If the contract is a printed contract, of course the terms of the printed part of the contract are effective, binding upon the parties, have mutually agreed to accept them, unless there is a conflict between that and some other provision in the contract or there is an ambiguity that has

to be resolved, and you find that there are typewritten provisions in the contract.

So when you interpret what the parties intended or come to a conclusion of what they intended, the typewritten provisions of the contract control over the printed provisions of the contract where there is a conflict or a difference regarding what the parties actually intended by the agreement. (R. 1267-1268).

The main idea, or at least one of the main ideas, if I recall correctly of the testimony, was that the Defendant had to, in order to comply with the State Law and the Federal Law, have fifteen percent of the project by a minority firm and two percent by a female firm. That is the law. That is the law in Pennsylvania. That is the law in the United States. (R. 1278).

And they entered into this contract with the idea in mind of meeting their obligations under the law, or meeting its

obligations under the law, and also by teaching or being a mentor to the Plaintiff in other fields in which the Plaintiff did not have proven expertise or was prepared to show that it had proven expertise at the time the contract was executed. (R. 1278-1279).

PROPOSED JURY CHARGE FILED BY JBS

The contract between the parties required ANJO to take all necessary and reasonable steps to ensure JBS, Inc., had the maximum opportunity to perform the contract. If you find that ANJO breached this provision by canceling the contract, you may find that ANJO breached the contract and awarded JBS damages which resulted from that breach. (R. 183).

JBS BRIEF IN OPPOSITION TO RESPONDENT'S POST TRIAL MOTIONS

The overwhelming weight of the evidence offered in this case, refutes Defendant's contention that Plaintiff could be terminated for failing to obtain approval.

Further evidence of this is Mr. Arnold's testimony which sets forth that PennDot has standard procedures that must be followed before a minority contractor is dismissed. These procedures require that any dismissal must be reviewed by the Bureau of Equal Opportunity. Mr. Arnold elaborated that the bottom line, as far as PennDot is concerned, is that a subcontractor can only be dismissed if they are unable to perform the work, due to some extreme circumstance, such as going bankrupt, or having inadequate supervision. The final authority as to whether a subcontractor can do the work is to have approval from the Commonwealth. (R. 296-297).

In summation, the above evidence establishes the parties agreed to a termination provision whereby Plaintiff could only be discharged for failing to perform efficiently. Furthermore, a minority contractor can only be dismissed

for cause. The obvious conclusion is that the Defendant's argument concerning a termination pursuant to Article 7 of the contract is without any merit. (R. 297).

BRIEF OF APPELLEE (JBS) FILED WITH THE SUPERIOR COURT OF PENNSYLVANIA

Finally, ANJO argues that they have an absolute right to terminate the contract under Article 7. This paragraph was found in the pre-printed form on the back of the contract. This clause is contrary to PennDot requirements which afford protection to minority subcontractors. (Appellee's Brief, Page 12).

A. William Arnold, Jr., Assistant Construction Engineer, with the Department of Transportation, testified on behalf of JBS in this matter. Mr. Arnold's current responsibilities include seeing that subcontractor approvals are processed as well as duties involving subcontracting administration. (R. 661; Appellee's Brief Pages 13-14).

Mr. Arnold testified that the Department of Transportation has specific requirements for the removal of a minority subcontractor. Mr. Arnold explained that a minority subcontractor can't be removed from the job unless the situation is reviewed by the Bureau of Equal Opportunity. (R. 669). Just cause for dismissal would be that the minority cannot perform the work either because they had gone bankrupt or they don't have adequate supervision of the work force to complete the job. (R. 669-670). (Appellee's Brief Page 14).

APPELLEE'S (JBS) APPLICATION FOR REARGUMENT BEFORE THE SUPERIOR COURT OF PENNSYLVANIA

This case involves the interpretation of a construction subcontract involving a Disadvantaged Business Enterprise (hereinafter, "DBE"). Participation of a DBE on the subject project was a requirement of Federal Law and PennDot regulations. As a result of these requirements, JBS was

entitled to various protections. Attached to the contract were the DBE Affirmative Action Requirements. These Requirements mandate that every minority subcontractor have the maximum opportunity to compete for and perform contracts in accordance with 49 C.F.R. Part 23.

49 CFR Part 23, as published in October, 1984, requires good faith efforts to replace minority subcontractors that are unable to perform. The regulations further require approval for any substitution of a DBE. The regulations do not provide for termination of a DBE without cause. (Appellee's Brief Page 3).

PETITION FOR ALLOWANCE OF APPEAL
TO THE SUPREME COURT OF PENNSYLVANIA
FILED BY JBS

The Superior Court decision disregards the evidence of PennDot and Federal regulations which prohibit termination of a minority subcontractor without cause. The contract provided that certain Exhibits be

attached and incorporated into the Agreement. Exhibit B of the contract is the Disadvantaged Business Enterprise Utilization Affirmative Action Requirements. Therein, it is stated that a Disadvantaged Business Enterprise, such as JBS, should have the maximum opportunity to participate in and perform contracts funded in whole or in part with Federal funds. This language is consistent with 49 CFR Part 23. (Brief Page 13).

49 CFR, Part 23, as published in October, 1984, requires a good faith effort to replace minority contractors that are unable to perform. - This language is consistent with the provision of the contract which was added to the pre-printed form and required that JBS could only be terminated if they failed to perform. The DBE Affirmative Action Requirements and/or 49 CFR Part 23 do not permit a contractor to replace a minority subcontractor without cause. The

Federal regulations also require approval for any substitution of a Disadvantaged Business Enterprise. These regulations are consistent with the testimony offered at trial by the PennDot employees. (Appellee's Brief @ Page 13).

49 CFR § 23.43 (b) requires each subcontractor to submit for approval a minority business enterprise Affirmative Action program. Said program shall be treated as a legal obligation. In this case, Defendant was required to provide JBS with the maximum opportunity to complete the project. This requirement is contrary to Defendant's argument that Article 7 allows Defendant to terminate the Agreement without cause. (Appellee's Brief @ Page 16). The Superior Court completely ignored the federal regulations pertaining to minority subcontractors. The constitution of the United States of America, @ Article VI, Clause 2, provides that the Laws of the

United States shall be the Supreme Law of the Land and the judges in every state shall be bound thereby. Federal Law includes Federal regulations, and they have no less preemptive effect than federal statutes. (Appellee's Petition @ Page 19).

PETITIONER'S APPLICATION FOR RECONSIDERATION OF DENIAL OF ALLOWANCE OF APPEAL TO THE SUPREME COURT OF PENNSYLVANIA

Petition for Allowance of Appeal shall be granted in this case, as the Superior Court has rendered an opinion which is not in accord with applicable decisions of the Supreme Court of Pennsylvania, the Supreme Court of the United States or the Affirmative Action Requirements for federally funded projects. The decision of the Superior Court is contrary to the spirit and intent of the Affirmative Action Requirements which were created to provide equal opportunity for minority business enterprises. (Application for reconsideration @ Paragraphs 22 & 24).

Supreme Court, U.S.
FILED
APR 17 1995
OFFICE OF THE CLERK

No. 94-1535

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

CLAUDE C. COUNCIL, JR.,
TRUSTEE FOR JBS CONTRACTING INC.,
A DEBTOR IN BANKRUPTCY,

Petitioner,

v.

ANJO CONSTRUCTION COMPANY,
A PENNSYLVANIA CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE PENNSYLVANIA SUPERIOR COURT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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April 17, 1995

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QUESTION PRESENTED

Whether the Court should exercise its extraordinary supervision to review a Pennsylvania intermediate appellate court's interpretation of a private contract pursuant to state law.

RULE 29.1 STATEMENT

Anjo Construction Company ("Anjo") has no parent company and no corporate subsidiaries.

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No. 94-1535

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

CLAUDE C. COUNCIL, JR.,
TRUSTEE FOR JBS CONTRACTING INC.,
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v.

ANJO CONSTRUCTION COMPANY,
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ON PETITION FOR WRIT OF CERTIORARI TO
THE PENNSYLVANIA SUPERIOR COURT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Anjo was the prime contractor under a contract with the Pennsylvania Department of Transportation to build a portion of the East Street Expressway. JBS Contracting Inc. ("JBS") was a subcontractor who entered into two nearly identical construction contracts (hereinafter the

"Contract") with Anjo to complete a portion of the project. When JBS failed to become prequalified and could not perform most of the work under the Contract, Anjo forwarded to JBS a notice that since JBS would be unable to perform, Anjo was cancelling the Contract. JBS initiated this breach of contract claim.

The Contract contains a termination clause in Article 7 which provides that JBS may terminate the Contract at any time by written notice to JBS (the "Termination Provision" or "Article 7.") App. at A17.[1] Under the Contract, if Anjo terminated JBS pursuant to Article 7, JBS was entitled to be paid for all materials furnished and work performed at the date of termination on a pro-rata basis, but JBS was not entitled to profits for the uncompleted portion of the Contract.

The Contract also includes a second termination clause, which applies to different situations than the Termination Provision, and provides that if JBS fails to meet Anjo's schedule, or fails to perform efficiently and expeditiously, Anjo reserves the right to terminate the Contract, hire other subcontractors, or complete the work using its own forces and backcharge JBS (the "Negligent Subcontractor Termination Provision.") App. at A17. The Termination Provision focuses on the remedy, or lack thereof, available to JBS in the event of its termination for any reason. The Negligent Subcontractor Termination Provision, on the other hand, describes the remedies available to Anjo in the event JBS failed to meet its schedule or perform competent work.

---

[1] JBS' Petition for Writ of Certiorari will be cited herein as "Petition." Citations to the decision of the Superior Court and to other portions of the Appendix to the Petition will be cited in the form of "App. at A."

Following an adverse jury verdict and the grant of partial relief to its post trial motion, Anjo appealed to the Pennsylvania Superior Court. The Pennsylvania Superior Court vacated the judgment of the trial court and remanded the case for entry of judgment notwithstanding the verdict. App. at A21. The Superior Court relied solely on Pennsylvania contract interpretation principles in holding that Article 7 clearly allows Anjo the right to terminate JBS for any reason. App. at A18-21. The Superior Court also emphasized that because JBS' complaint is for breach of contract premised on Anjo's alleged breach for termination without cause, and Anjo could contractually terminate JBS without cause, Anjo did not breach the Contract. App. at A21. It is this routine interpretation of state contract law which JBS now seeks to have reviewed by the Court.[2]

ARGUMENT

I.

THE PENNSYLVANIA SUPERIOR COURT'S DECISION DOES NOT PRESENT ANY OF THE RECOGNIZED BASES FOR CERTIORARI.

A writ of certiorari may be properly issued when a state court of last resort decides a federal question in conflict with a decision of another state court of last resort or of a United States court of appeals. Supreme Court Rule 10.1(b). Certiorari also may be granted when the state court of last resort decides a question of federal law which has not been, but should be, settled by the

[2] After the decision by the Superior Court, JBS requested rehearing by the Superior Court, which was denied; petitioned the Pennsylvania Supreme Court for allowance of appeal, which was denied; and petitioned the Pennsylvania Supreme Court for reconsideration, which was denied. App. at A22-24.

Court. Supreme Court Rule 10.1(c). The Court should only grant a writ of certiorari in cases "involving principles the settlement of which is of importance to the public, as distinguished from that of the parties." *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

The issue posited by Petitioner does not warrant the grant of a writ of certiorari because the Pennsylvania Superior Court merely exercised its appellate review in interpreting a private contract pursuant to state law. JBS' claim against Anjo is based on breach of contract. App. at A14. In reaching the state law contract issue, the Superior Court was not requested to and did not decide any questions of federal interest. There is not one reference to the United States Constitution, any federal statute or any federal regulation within the Superior Court's opinion. Because the opinion below involves the application of well-settled principles of Pennsylvania contract interpretation over the meaning of a provision in a private contract, there is no basis for certiorari.

JBS baldly concludes that the Superior Court's opinion conflicts with federal law and decisions of the Court. Petition at 16. Nevertheless, JBS provides no authority for any so-called conflict. Indeed, there is no conflict with the general contract interpretation principles relied on by the Superior Court.

II.
THE COURT DOES NOT HAVE JURISDICTION TO REVIEW THE ISSUES RAISED BY PETITIONER.

JBS claims that the Code of Federal Regulations and the Supremacy Clause of the United States Constitution prohibits the enforcement of Article 7. Petition at i. JBS fails to meet its burden of establishing that those federal issues were properly raised and considered below. *Street v. New York*, 394 U.S. 576, 582 (1969). The Court does not have jurisdiction to exercise appellate power over state court judgments unless a federal question was raised and considered by the state court below. *Yoakim v. Miller*, 425 U.S. 231, 234 (1976); *Cardinale v. Louisiana*, 394 U.S. 437, 438-439 (1969).

JBS has not demonstrated that the issues it raises to the Court were presented on a timely basis to the Superior Court or considered by that court. As noted earlier, the Pennsylvania Superior Court did not resolve or even consider any federal questions. Moreover, JBS did not properly raise any federal question before the Superior Court.

Although JBS claims that the affirmative action issue was presented to the Superior Court (Petition at 12), JBS did not argue on Anjo's appeal to the Superior Court, as it now does, that the so-called affirmative action requirements of 49 C.F.R. Part 23 or the United States Constitution prohibit the enforcement of the Termination Provision. App. at A38-39. Instead, JBS first claimed that the Termination Provision is unenforceable under 49 C.F.R. Part 23 or the Constitution when it applied for reargument before the Superior Court, petitioned the Pennsylvania Supreme Court for allowance of appeal and applied for reconsideration of the denial of allowance of

appeal to the Pennsylvania Supreme Court. App. at A39-43.

A federal issue is properly raised only when the issue was pursued on appeal as required by the state's law. *Beck v. Washington*, 369 U.S. 541, 549-551 (1962). In Pennsylvania, a party which waits for a request for reargument to present an issue to the Superior Court has waived its right to raise that issue. *Bell v. Koppers Co., Inc.*, 392 A.2d 1380, 1387 (Pa. Super. 1978); *United States v. Prasse*, 261 F.Supp. 760, 761 (E.D. Pa. 1966). Because JBS did not argue to the Superior Court that Article 7 was unenforceable as a result of any alleged affirmative action requirements or the United States Constitution until it requested reargument, it waived the right to raise a federal issue and there is no basis for the Court's jurisdiction. *Herndon v. Georgia*, 295 U.S. 441, 443 (1935) (The attempt to raise a federal question at a petition for rehearing is untimely, unless the court actually addresses and acts on the issue.)

Moreover, the Pennsylvania Supreme Court refused to even consider the issue now raised by JBS. App. at A23-24. When "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Street v. New York*, 394 U.S. at 582. JBS did not and cannot demonstrate that it presented any federal question for review in a timely fashion.

CONCLUSION

For the foregoing reasons, Anjo respectfully requests this Court to deny JBS' Petition for Writ of Certiorari.

Respectfully submitted,

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April 17, 1995